

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

ORIGINAL

76-7583

United States Court of Appeals
FOR THE SECOND CIRCUIT

V/O EXPORTKHLEB,
Plaintiff-Appellant,
against

TEXAS TRANSPORT & TERMINAL CO., INC., M/V
CONSTANTIA and CHRISTIAN F. AHRENKIEL,
Defendants-Appellees.

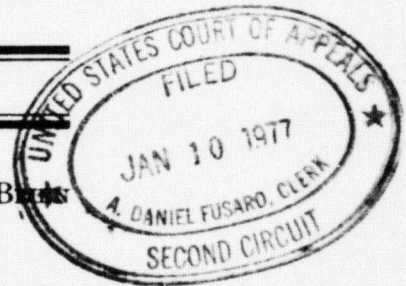
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

HILL RIVKINS CAREY LOESBERG & O'BRIEN
Attorneys for Plaintiff-Appellant
96 Fulton Street
New York, New York 10038

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Defendant-Appellee
Texas Transport & Terminal Co., Inc.
99 John Street
New York, New York 10038

CICHANOWICZ & CALLAN
Attorneys for Defendants-Appellees
M/V Constantia and Christian F.
Ahrenkiel
80 Broad Street
New York, New York 10004



PAGINATION AS IN ORIGINAL COPY

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A 1
DOCKET ENTRIES

75 Civ 254 V/O EXPORTER AND CONTINENTAL GRAIN EXPORT CORP. vs. AMTORG TRADING CORP. CANNELLA, J.

DATE	NR.	PROCEEDINGS
01-17-75		Filed Complaint, Issued Summons.
01-17-75		Filed Amended Complaint, Issued Summons.
01-29-75		Filed summons and return-served the following: Amtorg Trading Corp. by Mrs. Helen Lyakline on 01-22-75 Texas Transport & Terminal Co., Inc. by H. Rivera on 01-22-75
01-29-75		Filed amended summons and return- served the following: Amtorg Trading Corp. by Mrs. Helen Lyakline on 01-22-75 Texas Transport & Terminal Co., Inc. by H. Rivera on 01-22-75
02-21-75		Filed pliffs. consent to the withdrawal of Continental Grain Export Corporation as a plfff. without prejudice. So ordered- CANNELLA, J.
03-25-76		Filed pliffs' affdvt. and Order appointing process server. So ordered- CLERK
03-26-76		Filed affdvt. of service of amended summons by an individual- served: TTT Ship Agencies, Inc as agents for Christian F. Ahrenkel by Harold W. Pitts on 03-25-76
3-26-76		PRE-TRIAL CONFERENCE WITH J. CANNELLA, J.
04-28-76		Mailed notice of reassignment of this action to Haight, J.
04-28-76		Filed Affidavit & Notice of Motion by deft. Ahrenkiel for an order dismissing the complaint against the deft Ahrenkiel, etc, rthle before Haight, J. on 5-7-76.
04-28-76		Filed memo of law in support of motion to dismiss etc, as indicated.
04-27-76		Filed Deft's. (TTT Ship Agencies, Inc.) affidavit & notice of motion to dismiss the complaint, ret. 5-7-76.
04-27-76		Filed Deft's. (TTT Ship Agencies Inc.) memorandum of law in support of motion to dismiss.
05-06-76		Filed affidavit of Richard F. Randall in opposition to the motion to dismiss.
05-06-76		Filed affidavit of Joseph M. Mangino in opposition to the motion to dismiss.
05-12-76		Filed Deft's. (Ahrenkiel) reply affidavit in support of motion to dismiss.
05-12-76		Filed Deft's. (Ahrenkiel) reply memorandum in support of motion to dismiss.
05-12-76		Filed Defts'. reply memorandum of law.
10-28-76		Filed memo and order Complaint is dismissed in its entirety So Ordered Haight J. <i>in fee</i>
11-24-76		<i>File undertaking for costs on appeal in amt of \$250.00 (Fidelity & Deposit Co of N.Y.)</i>
11-24-76		Filed notice of appeal to the USCA for order of J. Haight dated 10-28-76. m/n

V/O EXPORTKHELb and CONTINENTAL GRAIN
EXPORT CORPORATION,

Plaintiffs,

NOTICE OF
MOTION

- against -

AMTORG TRADING CORPORATION and TEXAS
TRANSPORT & TERMINAL CO., INC., m/v
CONSTANTIA AND CHRISTIAN F. AHRENKEL,
Defendants.

S I R S :

PLEASE TAKE NOTICE that upon all the pleadings and proceedings heretofore had herein and upon the annexed affidavit of DAVID SWEET, sworn to the 9th day of April, 1976, the undersigned will make application at the United States District Court for the Southern District of New York at the Courthouse, Foley Square before the Honorable J.M. Cannella on the 7th day of May, 1976, at 9:30 o'clock in the forenoon for an order dismissing the complaint against defendant TTT Ship Agencies, Inc. (sued herein as Texas Transport and Terminal Co., Inc) on the grounds that it fails to state a cause of action against it because said defendant was an agent for a disclosed principal; fails to

Defendant TTT Ship Agencies, Inc.'s Notice of Motion

state a cause of action because said defendant is not a common carrier; nonjoinder and misjoinder; and forum non conveniens.

Yours etc.

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Defendants
Office & P.O. Address
99 John Street
New York, New York 10038

TO: HILL, RIVKINS, CAREY,
LOESBERG & O'BRIEN
96 Fulton Street

CICHANOWICZ & CALLAN
30 Broad Street

A 1

AFFIDAVIT OF DAVID SWEET IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

V/O EXPORTKHLEB and CONTINENTAL GRAIN
EXPORT CORPORATION,

: 75 Civ. 254 (JMC)

Plaintiffs,

- against -

: AFFIDAVIT IN SUPPORT
OF MOTION TO DISMISS

AMTORG TRADING CORPORATION and TEXAS
TRANSPORT & TERMINAL CO., INC., m/v
CONSTANTIA AND CHRISTIAN F. AHRENKEL,

:

:

Defendants.

-----x

STATE OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

DAVID SWEET, being of full legal age and being
duly sworn deposes and says:

1. That he is an employee of TTT Ship Agencies,
Inc., formerly known as, and sued herein as, Texas Transport
& Terminal Co., Inc., to wit, the Office Manager of the
Philadelphia office and has held said position for two (2)
years. This affidavit in support of the motion to dismiss
is based partly on deponent's personal knowledge and partly
on information contained in files which have been kept in
the usual course of business.

2. That at all relevant times defendant TTT

A 5
Affidavit of David Sweet

Ship Agencies, Inc. was acting as agent for a disclosed principal, i.e. v/o Sovfracht.

3. That at all relevant times defendant TTT Ship Agencies, Inc. had no interest in the cargo, vessel or freight monies.

4. That TTT Ship Agencies, Inc. is not now, nor was it then, engaged in business as a common carrier of goods by water.

5. That TTT Ship Agencies did not own, operate, manage, charter or otherwise control the m/v CONSTANTIA, in relation to this voyage and shipment, or any other.

6. That TTT Ship Agencies, Inc. acted as port agent or husbanding agent for v/o Sovfracht. v/o Sovfracht is a Russian entity, i.e. a chartering corporation based in Moscow, USSR.

7. That the plaintiffs herein knew that TTT Ship Agencies, Inc. was acting as agent only and knew the identity of its principal. In particular, Mr. Lloyd Williams of Continental Grain was familiar with this transaction.

8. That, upon information and belief, the subject vessel was owned by Christian F. Ahrenkel, who chartered it to Kawasaki Kisen Kaisha ("K" Line) who in turn sub-chartered it to Nordstorm and Thulin. The charterer and sub-charterer are not named as defendants herein even though they may be liable for the alleged damages under the terms of the charter parties.

A 6
Affidavit of David Sweet

9. That, upon advice of counsel, deponent believes the cargo was legally owned by either v/o Exportkhleb or Continental but not both. Therefore, one of these plaintiffs is unnecessary to the action and is not the real party in interest.

10. That, upon the advice of counsel, deponent believes that all parties are present and/or subject to service in Philadelphia, Pa., and that all potential witnesses reside in Philadelphia, or Nakhodka, USSR, or are officers and members of the crew; and that there is only one potential witness who resides in New York. Therefore, New York is not the proper forum in which to maintain this lawsuit.

11. That defendant TTT Ship Agencies, Inc. signed the relevant bill of lading pursuant to specific and limited authority of the master. This was done for the convenience of plaintiff, Continental Grain, who knew of such limited authority.

Wherefore it is respectfully requested that this Court issue an order dismissing the complaint against defendant TTT Ship Agencies, Inc.



DAVID SWEET

(Sworn to April 9, 1976)

A 7
DEFENDANT AHRENKIEL'S NOTICE OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

V/O EXPORTKHEB and CONTINENTAL GRAIN EXPORT CORPORATION,	:	
	:	75 Civ. 254 (JMC)
Plaintiffs,	:	
	:	
-against-	:	NOTICE OF MOTION
	:	PURSUANT TO RULE
AMTORG TRADING CORPORATION and TEXAS	:	<u>12(b) F.R.C.P.</u>
TRANSPORT & TERMINAL CO., INC., M/V	:	
CONSTANTIA and CHRISTIAN F. AHRENKEL,	:	
	:	
Defendants.		

-----X

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavits of Michael J. Carcich and Christian F. Ahrenkiel, the undersigned will move this Court at the U.S. Courthouse, Foley Square, New York, New York, Room 1001, on the 7th day of May, 1976, at 10:00 A.M. or as soon thereafter as counsel may be heard, for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing the complaint herein against the defendant Christian F. Ahrenkiel on the grounds of lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process, and statute of limitations.

A 8
Defendant Ahrenkiel's Notice of Motion

PLEASE TAKE FURTHER NOTICE that defendant demands that answering affidavits, if any, be served on the undersigned at least five days before the return date of this motion.

Dated: New York, N.Y.
April 27, 1976

TO: HILL, RIVKINS, CAREY,
LOESBERG & O'BRIEN
Attorneys for Plaintiff
96 Fulton Street
New York, N.Y. 10038

BIGHAM, ENGLAR, JONES &
HOUSTON,
Attorneys for Defendant,
Texas Transport & Terminal Co., Inc.
99 John Street, N.Y., N.Y. 10005

CICHANOWICZ & CALLAN
Attorneys for Defendant,
Christian F. Ahrenkiel

By: S/Victor S Cichanowicz
A Member of the Firm
80 Broad Street,
New York, New York 10004
(212) 344-7042

-----X

-against-

-----X

This action involves alleged damage to a shipment of corn in bulk from Philadelphia, to Nakhodka, U.S.S.R., on board the M/V CONSTANTIA, in July 1973. Christian F. Ahrenkiel

is the managing owner of that vessel. Plaintiff V/O Exportkhleb was the consignee of the grain. Plaintiff Continental Grain Export Corporation was the shipper of the grain, Defendant Texas Transport & Terminal Co., Inc., was the agent of the sub-charterer of the vessel, Sovfracth, Moscow. We are not aware of any involvement in this matter by Amtorg Trading Corporation, the other named defendant herein. Other parties involved in the transaction which are the subject matter of this suit but who have not been named as parties herein are Kawasaki Kisen Kaisha who chartered the vessel from the owner, and Nordstorm and Thulin who subchartered the vessel from Kawasaki Kisen Kaisha and in turn subchartered it to Sovfracht, Moscow.

This suit was commenced by filing a summons and complaint on January 17, 1975. The original complaint did not name Christian F. Ahrenkiel and the M/V CONSTANTIA as parties. On the same day an amended summons and complaint was filed without leave of the Court adding Christian F. Ahrenkiel and the M/V CONSTANTIA as defendants. On January 22, 1975, both the original and amended summons and complaint was served on defendants Amtorg Trading Corporation and Texas Transport & Terminal Co. Inc. Neither Ahrenkiel nor the vessel were served. Nothing else took place in this case until March 1, 1976, when the attorneys for the plaintiff threatened to enter a default

A 11
Affidavit of Michael J. Carcich

against Ahrenkiel unless he appeared by counsel at a pretrial conference before Magistrate Schrieber on March 1, 1976. The threat was directed to Lamorte, Burns & Co., Inc. the New York correspondent for Ahrenkiel's underwriters on Friday afternoon and the pretrial conference was scheduled for the following Monday. This was the first notice that a claim was being asserted against Ahrenkiel with respect to this matter.

On Monday morning, Lamorte, Burns pursuant to underwriters' instructions advised the office of Cichanowicz & Callan of the scheduled pretrial conference and of plaintiff's threat and asked that we attend. The docket sheet was checked and it was noted that Ahrenkiel had never been served in this action, nor had any attempt at service been made. Accordingly, we appeared before Magistrate Schrieber to advise him of that fact in the event any attempt to enter a default was made by the attorneys for the plaintiff. Magistrate Schrieber agreed that since no service on Ahrenkiel had ever been entered, we were entitled to appear specially on his behalf to oppose any motion for a default. He then adjourned the conference after directing us to investigate the details of service of process with respect to Ahrenkiel. We concluded our investigation on March 4, 1976, and advised Magistrate Schrieber and the attorneys for

A 12
Affidavit of Michael J. Carcich

the plaintiff that no service had been made or even attempted on Ahrenkiel and that he would not appear voluntarily.

Thereafter, on March 25, 1976, the attorneys for the plaintiff secured an order from the Clerk of the Court appointing a special process server, and attempted to serve Texas Transport & Terminal Co., Inc. as Ahrenkiel's general agent. Neither Texas Transport & Terminal Co., Inc. nor its successor company, TTT Ship Agencies, Inc. is now, nor ever was, the general agent of Ahrenkiel.

We appeared at the next pretrial conference before Magistrate Schrieber on April 5, 1976, to advise him of Ahrenkiel's position. He directed that the motion herein be made returnable by the first week of May 1976. Within that limited period, we have secured the attached affidavit of Christian F. Ahrenkiel that Texas Transport & Terminal is not his agent. We would also refer the Court to paragraph 11 of the affidavit of David Sweet, attached to the motion of Texas Transport & Terminal to dismiss the action as against it, also returnable May 7, 1976. That affidavit disclaims any agency relationship between Texas Transport & Terminal and Ahrenkiel (copy attached as Ex. 1). Accordingly, no service has ever been effected on Ahrenkiel, nor can any service be effected.

A 13
Affidavit of Michael J. Carcich

Furthermore, the addition of defendants Ahrenkiel and the vessel by amendment of the complaint without leave of Court was improper and had no effect. Accordingly, defendants Ahrenkiel and the vessel have never been made parties to this action. This point is discussed at length in the accompanying brief.

In addition, on its face the claim herein is time barred. The cargo was delivered in July, 1973 and no suit was commenced until January of 1975, despite the provisions of 46 U.S.C.A. 1303 (6) which requires suit to be commenced within one year of delivery of the cargo.


WHEREFORE, defendant requests that an order be entered dismissing the complaint as against defendant Christian F. Ahrenkiel.

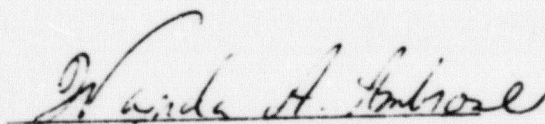
DATED: New York, New York

April 27, 1976

Sworn to before me this

27th day of April, 1976.


MICHAEL J. CARCICH


Wade A. Ambrose
Notary Public
New York City
New York

A 11

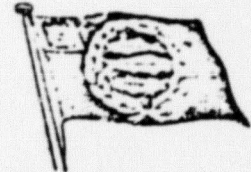
EXHIBIT 1--AFFIDAVIT OF DAVID SWEET ANNEXED TO
AFFIDAVIT OF MICHAEL J. CARCICH

Identical to Affidavit of David Sweet printed
herein at pages A4 to A6.

A 15

AFFIDAVIT OF CHRISTIAN F. AHRENKIEL IN SUPPORT OF MOTION

CHRISTIAN F. AHRENKIEL
REEDEREI UND SCHIFFFAHRTSKONTOR



CHRISTIAN F. AHRENKIEL, 2 HAMBURG 1, AN DER ALSTER 48

2 HAMBURG 1,
AN DER ALSTER 48

DURCHWAHL 2868-228
DIRECT LINE

8th April 1976.

TO WHOM IT MAY CONCERN

Christian F. Ahrenkiel, being duly sworn, deposes and says that he was the managing Owner of the M.V. "CONSTANTIA" during June and July 1973. Texas Transport & Terminal Co. Inc. never was and is not now my Agent.

CHRISTIAN F. AHRENKIEL
i.V. *[Signature]*

Certificate of Acknowledgment of Execution of an Instrument

(Country)
FEDERAL REPUBLIC OF GERMANY
AND CITY OF
HAMBURG
(County and/or other political division)
CONSULATE GENERAL OF THE UNITED STATES OF AMERICA
(County and/or other political division)
(Name of foreign service office)

David R. Pozorski Vice Consul

United States of America at Hamburg, Germany

Commissioned and qualified, do hereby certify that on this 9th

April 1976 before me personally appeared

Wilfried Hansen and Heinz Thiele

personally known, and known to me to be the individual~~s~~ described in, whose
signature subscribed to, and who executed the annexed instrument, and being
informed by me of the contents of said instrument they duly acknowledged to me
that they executed the same freely and voluntarily for the uses and purposes
therein mentioned.

In witness whereof I have hereunto set my hand and
official seal the day and year last above written.

David R. Pozorski

David R. Pozorski
Vice Consul of the United States of America.

[illegible]

:

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A 18
Affidavit of Richard I. Randall

master and annexed hereto and marked Exhibit A is the authority to Texas Transport & Terminal Co., Inc. from the master, dated June 1, 1973.

4. On June 11, 1974, I submitted on behalf of the underwriters a claim to Texas Transport & Terminal Co., Inc. and annexed hereto and marked Exhibit B is a copy of the response signed by the manager of the Claims Department, Harold W. Pitts. This letter acknowledges the claim and stated that I would be hearing from either Mr. Pitts or Mr. Burns from Lamorte, Burns & Co., Inc., who are the representatives of the P & I underwriters for the M/V CONSTANTIA.

5. Annexed hereto and marked Exhibit C is a letter of the ship's P & I underwriter, dated October 4, 1974 acknowledging the claim and stating that it will revert in due course. On June 11, 1974 Mr. Pitts also confirmed an extension of time within which to commence suit up to and including October 17, 1974, and Mr. Pitts assigned a claim number to the confirmation of extension and signed the extension.

6. Thereafter, on October 16, 1974, a further extension was granted by Texas Transport & Terminal Co., Inc. and on the confirmation a copy of the extension was forwarded to Lamorte, Burns & Co., Inc. This extension, annexed hereto and marked Exhibit D, extended the time within which to commence an action up to and including January 19, 1975.

7. On January 9, 1975, I was advised by Lamorte, Burns & Co., Inc. that no further extensions would be granted

A 19
Affidavit of Richard F. Randall

nor would Texas Transport & Terminal Co., Inc. grant any further extensions. Annexed hereto and marked Exhibit E is this letter.

8. I understand from the attorneys for the plaintiff, Hill, Rivkins, Carey, Loesberg & O'Brien, that suit was instituted in this Court on behalf of the consignee plaintiff on January 17, 1975.

9. I further state that when I filed the claim with Texas Transport & Terminal Co., Inc., I understood that it represented the vessel and that the extensions by Texas Transport & Terminal Co., Inc. who signed the bill of lading and by Lamorte, Burns & Co., Inc. were given on behalf of the P & I underwriters for the vessel owner.

S/ RICHARD F. RANDALL
RICHARD F. RANDALL

Sworn to before me
this 5th day of May, 1976

S/ JOSEPH M. MANGINO
Notary Public

JOSEPH M. MANGINO
Notary Public, State of New York
#43-7655273 Richmond County
Term Expires March 30, 1978

A 20

EXHIBIT A--MASTER'S AUTHORIZATION ANNEXED TO
AFFIDAVIT OF RICHARD F. RANDALL

Philadelphia, Pa.
1 June, 1973

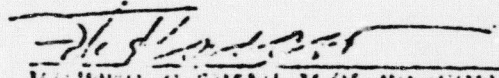
Penas Transport & Terminal Co., Inc.
400 Market Street
Philadelphia, Pa. 19106

Subject: GERMAN M/V "CONSTANTIA"

Dear Sirs:

I hereby authorize you to sign any and all documents
regarding the cargo of grain laden onboard my vessel during my recent
call to this port.

Yours very truly,


MASTER GERMAN M/V "CONSTANTIA"

A 21

EXHIBIT B--LETTER OF R.F. RANDALL, LTD. DATED JUNE 11, 1974
ANNEXED TO AFFIDAVIT OF RICHARD F. RANDALL

R. F. RANDALL, LTD.
CORRESPONDENT OF UNDERWRITERS

TELEPHONE: (212) 732-7386/7
TELEX 620864 CABLE: "RICRANDAL"

116 JOHN STREET
NEW YORK, N. Y. 10038

June 11, 1974

Texas Transport & Terminal Co., Inc.
21 West Street
New York, N.Y. 10006

Attention: Mr. Harold Pitts
Cargo Claims Manager

Re: M.V. "CONSTANTIA"; Bs/L #1 & 2
Philadelphia (6/15/73)/Nakhodka (7/16/74)
28,780,930 & 3,572,800 lbs. Corn in Bulk
Damage US\$56,700.58
Our Ref: R-50865

TTT- OUR CLAIM M 891/74

Gentlemen:

On behalf of our principals we have filed claim with you for loss and/or damages in the captioned shipment.

We would ask you to confirm extension of the time in which suit may be brought, in the matter, to and including October 17, 1974 by signing and returning to us the attached copy of this letter.

It is understood that your agreement to extend the time in which to sue places us in no better position than we would be had we commenced suit today.

Very truly yours,
R. F. RANDALL, LTD.

R. F. RANDALL, LTD.

Confirmed *[Signature]*

Date: *7-18-74*

A 22

EXHIBIT C--LETTER OF LAMORTE BURNS & CO., INC.
DATED OCTOBER 4, 1974 ANNEXED TO
AFFIDAVIT OF RICHARD F. RANDALL

Lamorte, Burns & Co., Inc.

Suite No. 3147

*One World Trade Center
New York, N. Y. 10048*

Correspondents For:

The Britannia Steam Ship Insurance Association Ltd.
International Mutual Strike Assurance Company (Bermuda) Ltd.
The London Steam-Ship Owners' Mutual Insurance Association Ltd.
Newcastle Protection and Indemnity Association
The North of England Protecting and Indemnity Association Ltd.
The Oceanus Mutual Underwriting Association Ltd.
The Oceanus Mutual Underwriting Association (Bermuda) Ltd.
The Shipowners' Mutual Strike Insurance Association (Bermuda) Ltd.
The Standard Steamship Owners' Protection and Indemnity Association Ltd.
The Standard Steamship Owners' Protection and Indemnity Ass'n (Bermuda) Ltd.
The Steamship Mutual Underwriting Association Ltd.
The Sunderland Steamship Protecting and Indemnity Association
The United Kingdom Mutual Steam Ship Assurance Association Ltd.
The United Kingdom Mutual Steam Ship Assurance Association (Bermuda), Ltd.

Telex: WU-12-5561 ITT-421478 RCA-235mg4
Telephone: (212) 432-0400 Cable Address: LABURNSHIP

Your Ref. R-50865

Our Ref. ACB/174-86

October 4, 1974

R. F. Randall, Ltd.
116 John Street
New York, N. Y., 10038

Attention: Mr. Richard F. Randall

CONSTANTIA - At Nakhodka, U.S.S.R. July 1973
Philadelphia Bs/L 1, 2 - Alleged Damage to
Corn in Bulk - \$56,700.58


Gentlemen:

The papers in connection with the above claim have been referred to this office for attention since we represent the P & I underwriters of this vessel.

We are asking our principals if they have any information and documents on this matter and will revert after we hear from them.

Yours very truly

LAMORTE, BURNS & CO., INC.


August C. Burns

/LB

A 23

EXHIBIT D--LETTER OF R.F. RANDALL, LTD. DATED OCTOBER 16,
1974 ANNEXED TO AFFIDAVIT OF RICHARD F. RANDALL

R. F. RANDALL, LTD.
CORRESPONDENT OF UNDERWRITERS

TELEPHONE (212) 732-7388/7
TELEX 830884 CABLE: "RICRANDAL"

116 JOHN STREET
NEW YORK, N. Y. 10038

Texas Transport & Terminal Co., Inc.
21 West Street
New York, N.Y. 10006

October 16, 1974

Attention: Mr. Harold Pitts
Manager, Cargo Claims Dept.

Re: Your Ref: 1091/74
Lamorte, Burns Ref: ACB/174-86
"CONSTANTIA" @ Nakhodka, U.S.S.R.
July 1973
Shipment: Corn in Bulk
Our Ref: R-50865

Gentlemen:

On behalf of our principals we have filed claim with
you for loss and/or damages in the captioned shipment.

We would ask you to confirm extension of the time
in which suit may be brought, in the matter, to and
including January 19, 1975 by signing and returning
to us the attached copy of this letter.

It is understood that your agreement to extend the
time in which to sue places us in no better position than
we would be had we commenced suit today.

Very truly yours,
R. F. RANDALL, LTD.

R. F. RANDALL, LTD.

Confirmed

Marie Hoban

Date:

10/24/74

cc. Lamorte, Burns & Co., Inc.
Att: Mr. August Burns

EXHIBIT E--LETTER OF LAMORTE BURNS & CO., INC.
DATED JANUARY 9, 1975 ANNEXED TO
AFFIDAVIT OF RICHARD F. RANDALL

Lamorte, Burns & Co., Inc.

Suite No. 3147

*One World Trade Center
New York, N. Y. 10048*

Correspondents For:

The Britannia Steam Ship Insurance Association Ltd.
International Mutual Strike Assurance Company (Bermuda) Ltd.
The London Steam-Ship Owners' Mutual Insurance Association Ltd.
Newcastle Protection and Indemnity Association
The North of England Protecting and Indemnity Association Ltd.
The Oceanus Mutual Underwriting Association Ltd.
The Oceanus Mutual Underwriting Association (Bermuda) Ltd.
The Shipowners' Mutual Strike Insurance Association (Bermuda) Ltd.
The Standard Steamship Owners' Protection and Indemnity Association Ltd.
The Standard Steamship Owners' Protection and Indemnity Ass'n (Bermuda) Ltd.
The Steamship Mutual Underwriting Association Ltd.
The Sunderland Steamship Protecting and Indemnity Association
The United Kingdom Mutual Steam Ship Assurance Association Ltd.
The United Kingdom Mutual Steam Ship Assurance Association (Bermuda), Ltd.

Telex: WU-12-5581 ITT-421478 RCA 235584
Telephone: (212) 432-0400 Cable Address: LABURNSHIP

Your Ref. R-50865

Our Ref. ACB/174-36

January 9, 1975

R. F. Randall, Ltd.
116 John Street
New York, N.Y. 10038

Attention: Mr. R. F. Randall

CONSTANTIA - At Nakhodka July 1973
Philadelphia Bs/L 1 & 2 - Alleged
Damage to Corn in Bulk - \$56,700.58

Gentlemen:


Our recent telephone conversation is confirmed when we advised you that although Texas Transport & Terminal Co., Inc. thought we would be involved since we do a considerable amount of work for Russian fleets entered for P & I in London, on checking by us, we learned that Sovfracht, Moscow did not have coverage in London. Therefore, neither we, nor Texas Transport, can grant further extensions on their behalf.

We had been in touch with Amtorg Trading Corporation here in New York, who act as agents for various Russian fleets, and they stated that it would be better for you to contact them about any future extensions of time.

We regret we cannot help you further on this.

Yours very truly,

LAMORTE, BURNS & CO., INC.


August C. Burns

ACB:LF

cc: Texas Transport & Terminal Co., Inc.
File M 891/74
Attention: Mr. H. W. Pitts

AFFIDAVIT OF JOSEPH M. MANGINO IN OPPOSITION TO MOTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

V/O EXPORTKHLEB and CONTINENTAL GRAIN :Index No. 75 Civ. 254
EXPORT CORPORATION, : (CSH)

Plaintiffs,

- against -

AMTORG TRADING CORPORATION and TEXAS
TRANSPORT & TERMINAL CO., INC., M/V
CONSTANTIA and CHRISTIAN F. AHRENKEL,

Defendants.

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOSEPH M. MANGINO, being duly sworn, deposes and
says:

1. I am an associate of the firm of Hill, Rivkins,
Carey, Loesberg & O'Brien, attorneys for the plaintiff herein,
and make this affidavit in opposition to the motion to
dismiss on the basis of conversations and documents contained
in the file.

2. On January 17, 1975, I assisted in the prepara-
tion and arrangement for the filing of a complaint and on the
same day an amended complaint causing this action to be filed
in this Court. Thereafter, Texas Transport & Terminal Co.,
Inc., by its Claims Manager, Harold W. Pitts, pursuant to
agreement with this firm, stipulated that its time to answer

and appear was extended. These extensions to appear and answer were granted and on or about July 21, 1975 we received confirmation that Texas Transport & Terminal Co., Inc. received authority from the master to issue bills of lading.

3. On August 5, 1975, Texas Transport & Terminal Co., Inc., by its Claims Manager, confirmed that it was advising the owner's representatives of the facts so that they could be instructed as to an attorney to be assigned in representing the owner. This was never done.

4. On February 12, 1976, Messrs. Lamorte, Burns & Co., Inc. said that they do represent the P & I underwriters for the vessel. Annexed and marked Exhibit A is its letter. Since Texas Transport & Terminal Co., Inc. acted for and on behalf of the master of the vessel on March 25, 1976 we arranged for service of the summons and amended complaint and served Texas Transport & Terminal Co., Inc., as agents for the owners of the CHRISTIAN F. ARENKEL.

5. The argument that Continental Grain Export Corporation is not a proper party is academic because plaintiff's attorney did on February 12, 1975 withdraw Continental Grain Export Corporation as a plaintiff. Annexed hereto and marked Exhibit B is a copy of the withdrawal of Continental Grain Export Corporation as a plaintiff, which was properly filed with this Court.

6. Texas Transport & Terminal Co., Inc. acted for

Affidavit of Joseph M. Mangino

the owners and granted extensions of time in which to commence an action and also kept the P & I Club for the owners aware that the suit was pending and proper services were made on the owners through its agents, Texas Transport & Terminal Co., Inc.

WHEREFORE, it is respectfully requested that the motion to dismiss be denied.

S/ Joseph M. MANGINO

JOSEPH M. MANGINO

Sworn to before me

this 5th day of May, 1976

S/ LOUIS N. GIANGARRA

Notary Public

Notary Public, State of New York
No. 24-4525960 Qual. in Kings County
Cert. Filed in New York County
Commission Expires March 30, 1978

A 28

EXHIBIT A--LAMORTE, BURNS & CO., INC.'S LETTER
OF FEBRUARY 28, 1976 ANNEXED TO
AFFIDAVIT OF JOSEPH M. MANGINO

RECEIVED

MAR 1 1976

Lamorte, Burns & Co., Inc.

Suite No. 3147

One World Trade Center
New York, N. Y. 10048

Telex: WU-12-5581 ITT-421478 RCA-235584
Telephone: (212) 432-0400 Cable Address: LABURNSHIP

Your Ref. LPC/JMM

Our Ref. ACB/174-86

February 28, 1976

Correspondents For:
The Britannia Steam Ship Insurance Association Ltd.
International Mutual Strike Assurance Company (Bermuda) Ltd.
The London Steam-Ship Owners' Mutual Insurance Association Ltd.
Newcastle Protection and Indemnity Association
The North of England Protecting and Indemnity Association Ltd.
The Oceanus Mutual Underwriting Association Ltd.
The Shipowners' Mutual Strike Insurance Association (Bermuda) Ltd.
The Standard Steamship Owners' Protection and Indemnity Association Ltd.
The Standard Steamship Owners' Protection and Indemnity Ass'n (Bermuda) Ltd.
The Steamship Mutual Underwriting Association Ltd.
The Sunderland Steamship Protecting and Indemnity Association
The United Kingdom Mutual Steam Ship Assurance Association Ltd.
The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd.

Hill Rivkins Carey Loesberg & O'Brien, Esqs.
96 Fulton Street
New York, N. Y., 10038

Attention: Leo P. Cappelletti, Esq.

CONSTANTIA - At Nakhodka July, 1973
Philadelphia Bs/L 1, 2 - Alleged Damage
to Corn in Bulk - Suit: \$56,700.58

Dear Sirs:

Yesterday afternoon we received the Amended Summons and Complaint you served on TTT Ship Agencies, Inc. noting that pre-trial conference is scheduled for March 1, 1976 at 2:15 P.M. We tried to reach Mr. Mangino by telephone but were unsuccessful.

We originally learned of this claim through R. F. Randall, Ltd. and determined that the Russian Time Charterers did not have entry in any of the Clubs we represent. No claim had been directed against the Owners of the vessel who did have coverage with the Steamship Mutual Association whom we do represent.

Our purpose in calling was to inquire (1) whether the Owners in Hamburg were ever served with the suit papers, and (2) whether anyone obtained an extension of time from the Owners. It would appear not. When we were in touch with R. F. Randall and TTT, we were informed that they had given no extensions. The Managing Owners of the vessel were Christian F. Ahrenkiel of Hamburg. Kawasaki Kisen Kaisha, Ltd. chartered the vessel from Ahrenkiel and then sub-chartered her to Sovfracht, Moscow. In the event Owners have not been served, we see no point in referring this matter to counsel.

Please telephone the writer on Monday morning about this.

Yours very truly
LAMORTE, BURNS & CO., INC.

August C. Burns

ACB:LB

EXHIBIT B--CONSENT TO WITHDRAW CONTINENTAL GRAIN
EXPORT CORPORATION ANNEXED TO
AFFIDAVIT OF JOSEPH M. MANGINO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

V/O EXPORTGRAIN and CONTINENTAL GRAIN
EXPORT CORPORATION, :

Plaintiffs,

Index No.

-against-

: 75 Civ. 254 JMC

AMTORG TRADING CORPORATION and TEXAS
TRANSPORT & TERMINAL CO., INC., M/V
CONSTANTIA and CHRISTIAN F. A. KEMEL, :

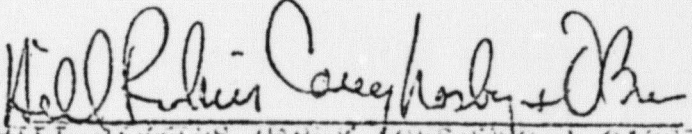
Defendants

----- X

None of the defendants having appeared or
answered, the attorneys for the plaintiffs do hereby
consent to the withdrawal of CONTINENTAL GRAIN EXPORT
CORPORATION as a plaintiff in this action without prejudice
to any and all proceedings had or hereafter to be had
herein.

Dated: New York, N.Y.

February 12, 1975


HILL RIVKINS CAREY LOEBBERG & O'BRIEN
Attorneys for Plaintiff

REPLY AFFIDAVIT OF MICHAEL J. CARCICH IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

V/O EXPORTER and CONTINENTAL GRAIN :
EXPORT CORPORATION, :

75 Civ. 254 (CSH)

Plaintiffs, :

REPLY AFFIDAVIT

-against-

IN SUPPORT OF

MOTION TO DISMISS

AMTORG TRADING CORPORATION and TEXAS :
TRANSPORT & TERMINAL CO., INC., M/V :
CONSTANTIA and CHRISTIAN F. AHRENKIEL, :

Defendants. :
-----X

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

MICHAEL J. CARCICH, being duly sworn, deposes and
says:

I am an associate of the firm of CICCIANOWICZ & COWLEY,
attorneys for defendant CHRISTIAN F. AHRENKIEL. I have read
the affidavits of Joseph M. Mangino and Richard F. Randall
submitted in opposition to defendant Ahrenkiel's motion to
dismiss and I make the following reply.

Neither Mr. Mangino's convoluted reasoning, nor Mr.
Randall's misstatements of the contents of the letters attached
to his affidavit can change the simple facts of this case. A
claim was submitted to Texas Transport & Terminal Co., Inc. on

or about June 11, 1974 with respect to damage to a shipment of grain carried on the M/V CONSTANTIA in June and July, 1973 from Philadelphia to Russia. Texas Transport & Terminal Co., Inc., was at that time, and is now the general agent for Sovfracht, Moscow, the sub-charterer of the vessel on the voyage in question. TTT forwarded the claim documents to Lamorte, Burns & Co., Inc. under the mistaken impression that Sovfracht was entered with one of the P. & I. Clubs with which Lamorte, Burns corresponds. When it was discovered that Sovfracht had no such entry, the claim was returned to TTT and Amtorg Trading Corporation, the Russian trading headquarters in New York was so advised (Exhibit 1), as was R.F. Randall, Ltd. (Randall Exhibit E). Lamorte, Burns then dropped the matter since it had only been involved in the mistaken belief that Sovfracht was entered for P. & I. coverage with a Club with which Lamorte, Burns corresponds.

Mr. Mangino, however, alleges that this limited Lamorte, Burns involvement on behalf of Sovfracht brought defendant Ahrenkiel into the case. He does not claim that Lamorte, Burns is Ahrenkiel's agent. It is not. He claims that if Lamorte, Burns acquiesced to the extensions of suit time by TTT on behalf of Sovfracht, that mere acquiescence bound the owner and made TTT the owner's agent. He does not explain how a third party can create an agency relationship

between the owner and TTT. Clearly it cannot. This point is discussed further in the accompanying memorandum of law.

The other slender thread on which plaintiff hangs its claim that TTT was the owner's agent is the letter from the master of the vessel to TTT authorizing it to sign bills of lading on his behalf (Randall Exhibit A). The authorization from the Master to sign bills of lading had to be given, at plaintiff Continental's request, precisely because everyone involved in this transaction knew that TTT was not the owner's agent. (Exhibit 2) The owner's protecting agent for this visit to Philadelphia was Furness Withy. (Exhibit 3)

If there is still doubt in the Court's mind as to the actual effect of the master's authorization to TTT to sign bills of lading, we request an opportunity to submit testimony on this point. The authorization is not a novel document. It is of a type customarily used in the maritime industry to expedite issuance of bills of lading and its meaning is well known to everyone employed in that field. We believe it is clear, however, that it is no more than an authorization to sign bills of lading and we do not feel that this Court, familiar as it is with maritime matters, will have any difficulty in the interpretation of the document.

WHEREFORE, defendant Ahrenkiel respectfully requests

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Reply Affidavit of Michael J. Carcich

that an order be entered herein dismissing the complaint and
the amended complaint as to it.

Dated: New York, N.Y.
May // , 1976

Michael J. Carcich
Michael J. Carcich

Sworn to before me this

11th day of May, 1976.

Andrew Weiss

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EXHIBIT 1--LETTER DATED DECEMBER 5, 1974 FROM LAMORTE,
BURNS & CO. TO AMTORG ANNEXED TO REPLY
AFFIDAVIT OF MICHAEL J. CARCICH

ACB/174-86

December 5, 1974

Captain Il. I. Timofeyev
Amtorg Trading Corporation
355 Lexington Avenue
New York, N. Y. 10017

CONSTANTIA - At Nakhodka July 1973
Philadelphia Bs/L 1 & 2 - Alleged
Damage to Corn in Bulk - \$56,700.58

Dear Captain Timofeyev,

Texas Transport & Terminal Co., Inc., who are agents for Sovfracht, Moscow, have been in correspondence with us in respect to the above claim. Since The United Kingdom Mutual Steam Ship Assurance Association (Bermuda), Ltd. cover a considerable number of Russian vessels for owners' account, we thought that perhaps this vessel might be covered with them for charterers' account. This Club, however, has advised us that they have no charterers' entry for Sovfracht on the CONSTANTIA.

When we asked Texas Transport why they had sent the papers in connection with the matter to us, they sent us copy of Inter-Office Correspondence from their New Orleans office dated December 11, 1973. Copy of same is attached. As you will see, it is stated that you had recommended in case of need that Texas Transport should apply for legal assistance of a P & I nature to our office. It was on this basis that not only did they send us the papers, but they also extended the time of claimants' representative, R. F. Randall, Ltd., the present extension expiring January 19, 1975.

We would like confirmation as to whether or not you do wish us to continue dealing with the case for your account, inasmuch as the Club does not cover. We would appreciate hearing from you on this.

Yours very truly,
LAMORTE, BURNS & CO., INC.

August C. Burns

ACB:LF
Enclosure

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EXHIBIT 2--LETTER DATED JUNE 5, 1973 FROM JAY INTERNATIONAL INC. TO TEXAS TRANSPORT ANNEXED TO REPLY AFFIDAVIT OF MICHAEL J. CARCICH

INTERNATIONAL FLIGHT FORWARDERS



P. M. LICENSE No. 936

JAY INTERNATIONAL INC.

LAFAYETTE BUILDING
PHILADELPHIA, PA. 19106
Phone 215/923-7021

June 5th 1973

Texas Transport & Terminal Co., Inc.
400 Market Street
Philadelphia, Pa.

Attn: Mr. Jack Branson

Dear Mr. Branson

This is to advise you that Continental Grain Co. will be loading a cargo of 15,000 L/T (600,000 Bushels) 5 Pct. M/L., three yellow corn max. 15 Pct. Moisture- treated with Malathion, into the M.V. CONSTANTIA.

AS FOLLOW:

FIRST BERTH AT: Port Richmond Elevator, supplied by Bunge Corporation consisting of Min./Max. quantity 12,848,629 L/Tons (513,945 10/56 Bushels) three yellow corn- Max 15 Pct. Moisture, treated with Malathion.

SECOND BERTH AT: Girard Point Elevator, supplied by Tidewater Grain Co. consisting of: about 3,500 L/Tons of three yellow corn Max. 15 Pct. Moisture, treated with Malathion.

We are requesting, on behalf of Continental Grain Co., a written authorization from the Master of the M/V Constantia, that you have permission to sign Originals of the B/Lading on his behalf.

Please, note, that when the vessel arrives, immediately inform the Commercial Exchange of Philadelphia, so that they may send out Mr. S.E. Morris, a licensed grain inspector, to inspect the vessel and issue the Storage Examination Certificate (a special separate certificate) certifying that the storage space examined and found to be substantially clean and dry and ready to receive grain on the above date.

Enclosed S.E.D.

If you have any questions, or problems in this matter, do not hesitate to contact us.

Sincerely yours

Jay International Inc. as agents
for Continental Grain Co.

Hilda Pereira

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EXHIBIT 3--LETTER DATED JUNE 29, 1973 FROM FURNESS
WITHY TO AHRENKIEL ANNEXED TO REPLY
AFFIDAVIT OF MICHAEL J. CARCICH

Furness Withy Agencies (USA) / < 16
(Furness Withy & Co Ltd)

1010 Public Ledger Building Independence Square Philadelphia Pa 19106
Telephone (215) 627-7200 Telex 710-670-0115 Cables Furness

Our reference Your reference

Branches or Agents World-Wide
North America Offices at

Baltimore Md	Portland Ore
Boston Mass	San Francisco Calif
Chicago Ill	St Louis Mo
Cleveland Ohio	St Paul Minn
Galveston Tex	Wakarusa Wis
Houston Tex	Montreal PQ
New Orleans La	Saint John NB
New York NY	St John's NF
Norfolk Va	Toronto Ont
Philadelphia Pa	Vancouver BC
	Winnipeg Man

AIRMAIL - SPECIAL DELIVERY

June 29, 1973

Christian F. Ahrenkiel
Reederei Und Schiffahrtshonorar
2 Emburg 11
Mattenvierte 8, Germany

Attention: Mr. Thiele

RE: M/V "CONSTITUTION" at Philadelphia 5/31 - 6/15/73

Gentlemen:

Please find enclosed herewith the below listed documents:

- On-Hire Statement from Ahrenkiel to "M" Line
- On-Hire Statement from "M" Line to Nordstrom and Thulin
- On-Hire Statement from Nordstrom to Sovfracht
- Notice of Readiness signed by Jay International Inc. on behalf of Continental Grain Co., U.S.
- Bryant and Irwin Survey Report
- Official U.S. Government weather report covering the period of vessel's stay in Philadelphia
- report on quantity of fuel on board vessel at 0900 and 2100 hours

Texas Transport in Philadelphia informs us that they are not permitted to divulge information as to how much grain was loaded at the installations in Philadelphia. These instructions come from the Russians. We, in turn, have been able to establish approximately how much grain was loaded which is as follows: 6/11 - 245,200 tons/6130 T-- 6/12 - 3897 L/T, and 6/13 2800 tons (per our tlx June 19).

We thank you for placing your vessel in our care and hope same was handled to your satisfaction.

Very truly yours,

FURNESS WITHY AGENCIES (USA)

F. H. Clifton
F. H. Clifton
Manager

encl.

MC:eng

cc: Mr. Carle - "M" Line, U.S. (u/encl)
Nordstrom and Thulin, Sweden

MEMORANDUM AND ORDER APPEALED FROM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

V/O EXPORTKHEB and CONTINENTAL
GRAIN EXPORT CORPORATION,

Plaintiffs,

-against-

AMTORG TRADING CORPORATION and
TEXAS TRANSPORT & TERMINAL CO., INC.,
M/V CONSTANTIA and CHRISTIAN F.
AHRENKEL,

Defendants.

75 Civ. 254-CSH

MEMORANDUM AND ORDER

HAIGHT, District Judge:

In this maritime action for alleged cargo loss and damage, defendants shipowner and loading port agent move to dismiss the complaint as to them. We grant the motions, and dismiss the complaint in its entirety.

I.

In June, 1973, the M/V CONSTANTIA loaded a cargo of grain at the port of Philadelphia. The cargo was shipped by Continental Grain Export Corp. ("Continental"), originally named a party plaintiff but subsequently withdrawn as such. The CONSTANTIA carried the cargo to the port of Nakhodka, U.S.S.R., and made delivery to plaintiff V/O Exportkhele. Plaintiff's suit alleges damage and loss of cargo during the ocean carriage.

The CONSTANTIA is owned by defendant Christian F. Ahrenkel ("Ahrenkel"), a West German resident. At the time of

the voyage in suit Ahrenkel had chartered the vessel to Kawasaki Kisen Kaisha (not a party to the litigation), who had sub-chartered her to Nordstrom & Thulin (also not a party), who had in turn sub-chartered her to Sovfracht, a Russian shipping concern (also not a party). Sovfracht arranged for the carriage of the cargo in suit.

At Philadelphia the vessel owner, Ahrenkel, appointed Furness Withy Agencies (USA) to act as his protective agent. Where a vessel is operating under charter, it is the function of a shipowner's protective agent to assist the master in the preparation of charter party documents such as notices of readiness and on-hire statements; to arrange for surveys; and to report to the shipowner on weather conditions at the loading port, the amount of fuel on board, and amount of cargo loaded. Furness Withy performed those services for Ahrenkel and the CONSTANTIA at Philadelphia, reporting thereon in its letter to Ahrenkel of June 29, 1973, which concluded with an expression of appreciation "for placing your vessel in our care."

Defendant Texas Transport & Terminal Co., Inc. ("TTT") acted as agents at Philadelphia for Sovfracht, the sub-charterer who arranged for the CONSTANTIA's cargo. TTT obtained from the master written authority dated June 1, 1973 "to sign any and all documents regarding the cargo of grain laden onboard my vessel during my recent call to this port." While copies of the charter parties and bills of lading are not before the court, it is customary for the owner or disponent owner² of a chartered vessel to

authorize the charterer (who contracts for carriage of the cargoes) to execute bills of lading on behalf of the master. This procedure is likely to save turnaround time at the loading port. The court infers that this practice was followed in the case at bar. The parties appear to agree that on the voyage in suit TTT signed the bills of lading on behalf of the master. There is no evidence that TTT signed any other document or took any other action on behalf of the master, vessel or shipowner.

Plaintiff's claim for cargo damage was placed in the hands of its cargo loss underwriters. Their New York correspondent is R. F. Randall, Ltd, ("Randall"). Under date of June 11, 1974, Randall wrote to TTT, stating that:

"On behalf of our principals we have filed claim with you for loss and/or damages to the captioned shipment." (emphasis added).

The letter goes on to request an extension of time in which suit may be brought "to and including October 17, 1974." The caption on Randall's letter indicates that the CONSTANTIA loaded her cargo at Philadelphia on June 15, 1973 and arrived at Nakhodka on July 16. Randall was undoubtedly concerned about the one-year time limitation in the United States Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §1303(6), ³ the statute which the parties appear to agree governed the contract of carriage. Randall's letter to TTT concludes:

"It is understood that your agreement to extend the time in which to sue places us in no better position than we would be had we commenced suit today."

TTT confirmed the requested extension by endorsing and returning a copy of the Randall letter.

Nothing further appears to have happened until, under date of October 4, 1974, the office of Lamorte, Burns & Co., Inc. ("Lamorte") addressed the following letter to Randall:

"The papers in connection with the above claim have been referred to this office for attention since we represent the P & I underwriters of this vessel.

"We are asking our principals if they have any information and documents on this matter and will revert after we hear from them." (emphasis added).⁴

On October 16, 1974, one day before the October 17 date referred to in Randall's letter of June 11 to TTT, Randall wrote again to TTT in precisely the same terms as its prior letter to that company, requesting an extension of time for suit to and including January 19, 1975. TTT confirmed that agreement by endorsing and returning a copy of the letter to Randall, noting on the bottom of the confirmation copy that a copy had also been sent to Lamorte.

The next development consists of Lamorte's letter to Randall of January 9, 1975. In that letter, Lamorte advised Randall, in effect, that TTT gave Lamorte notice of the claim under the mistaken impression that Lamorte's underwriter principals in London covered the charterers' liability of Sovfracht, the sub-charterer which arranged for the carriage of this particular cargo on the CONSTANTIA. Lamorte, in its January 9 letter, further

advised Randall that its principals did not cover Sovfracht; "therefore," Lamorte continues, "neither we, nor Texas Transport, can grant further extensions on their behalf." Lamorte made the further suggestion that Randall communicate with Amtorg Trading Corporation, "who act as agents for various Russian fleets." This last letter of Lamorte's prompted institution of suit by plaintiff against Amtorg Trading Corporation, TTT, the M/V CONSTANTIA and Ahrenkel on January 17, 1975.

The motion papers before me include affidavits from Ahrenkel and from an officer of TTT, to the effect that TTT had never acted as Ahrenkel's agent in respect of the CONSTANTIA, TTT having acted instead as port agent or husbanding agent for Sovfracht, the vessel's last sub-charterer in line. There is no evidence in the record before me to dispute these assertions. As noted above, Ahrenkel appointed Furness Withy as the shipowner's protecting agent at the loading port of Philadelphia.

II.

Against these facts, Ahrenkel moves to dismiss the complaint as to him on the grounds of (1) lack of personal jurisdiction, (2) insufficiency of process, and (3) time bar.

While these grounds for dismissal are separately stated, they turn upon the same essential proposition: whether the one-year statute of limitations in COGSA, which would expire one year after delivery of the goods on July 16, 1973, was extended in such a manner as to be binding upon Ahrenkel. This question, in turn, depends upon the relationship between TTT and Ahrenkel. That is

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Memorandum and Order Appealed From

so because plaintiff refrained from filing suit in July of 1974 in reliance upon TTT's confirmation, in response to Randall's letter of June 11, 1974, that the time for filing of suit was extended to and including October 17.

If that extension of time, given by TTT to Randall in the manner described, was not binding upon Ahrenkel, then the statute of limitations ran as to Ahrenkel in July of 1974, and plaintiff's claim is time-barred as to that defendant. In addition, in the absence of the appropriate agency relationship between TTT and Ahrenkel, plaintiff's attempt to obtain personal jurisdiction over Ahrenkel by serving the complaint upon TTT is a nullity.

I hold that the extension of time given by TTT was not binding upon Ahrenkel; and that service of the complaint by plaintiff upon TTT did not give rise to personal jurisdiction over Ahrenkel.

The issue turns upon basic principles of agency. Under COGSA plaintiff had one year from the delivery of the cargo to sue Ahrenkel. That time limit could be extended by Ahrenkel himself, or by an agent authorized to do so on his behalf. Plaintiff does not suggest that Ahrenkel personally granted such an extension. Thus I must ask whether, in the circumstances of the case, TTT was authorized to bind Ahrenkel to an extension in plaintiff's favor. An agent may derive express authority from the principal's "manifestations of consent to him", §7, Restatement of the Law of Agency (2d); or an agent may be clothed with apparent authority, which is:

"...the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." §8, Restatement of the Law of Agency (2d).

Neither form of authority is presented in the case at bar. Plaintiff does not suggest that Ahrenkel gave express authority to TTT to extend the statutory time for suit; and all the evidence is precisely to the contrary. With regard to apparent authority, its existence depends upon the manifestations of the principal to the third person, who relies upon them. In the context of the present case, this would require a manifestation from Ahrenkel to plaintiff that TTT was authorized to bind Ahrenkel. The record is equally devoid of any such indication.

It follows that the endorsement of TTT on the Randall letter of June 11, 1974 had no effect whatsoever upon Ahrenkel; and the consequence of that conclusion is that plaintiff's claim against Ahrenkel in personam and the CONSTANTIA in rem became time-barred on or about July 16, 1974.

None of the subsequent communications, involving TTT and Lamorte, serves to revive the plaintiff's deceased claim against the vessel or her owner. That claim having expired together with the expiration of the statute of limitations, it could be raised, like Lazarus, only by the direct and miraculous intervention of the shipowner himself. Ahrenkel has not comported himself in such a manner; on the contrary, he moves to dismiss the complaint.⁵

I have carefully considered the Lamorte letter of October 4, 1974, in which Lamorte advised Randall that "we represent the P & I underwriters of this vessel." That was a remarkably careless statement for Lamorte to make in the circumstances, since the phrase "underwriters of this vessel" could reasonably be interpreted by Randall as meaning the underwriters of the registered owner of the vessel (as opposed to a charterer or sub-charterer). Indeed, Randall placed just such an interpretation upon the Lamorte letter, and, when TTT endorsed a further requested extension on October 16, 1974, and sent a copy to Lamorte, Randall and the plaintiff undoubtedly believed that plaintiff still had time within which to sue Ahrenkel and the CONSTANTIA. In point of fact, Lamorte was entirely incorrect in its statement in the October 4 letter; by January 9, 1975, when Lamorte had looked into the question of which interests, if any, Lamorte or its principals represented, it ascertained that there was no representation at all, either of shipowner or charterer. Lamorte so advised Randall in its letter of January 9, 1975.

Circumstances may arise where an underwriter or an underwriter's representative, giving such inaccurate information to one in plaintiff's position, may be liable in consequence. If the evidence showed that, at the time of Lamorte's letter to Randall of October 4, 1974, the time to sue the shipowner had not yet run out, and plaintiff had relied upon Lamorte's letter in permitting the statute to expire on the basis of an extension granted or approved by Lamorte, then it is at least arguable that,

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Memorandum and Order Appealed From

even if Lamorte had no authority to bind the shipowner, Lamorte would be liable to one in plaintiff's position, either on the theory of breach of an implied warranty of authority, §329, Restatement of the Law of Agency (2d), or on the basis of tortious misrepresentation, §330, Restatement. However, such potential liability does not arise in the case at bar, since for the reasons stated the statute of limitations had expired prior to Lamorte's letter of October 4.⁶

III.

Defendant TTT moves to dismiss the complaint against it on the basis that it acted as agent for a disclosed principal, and related causes.

This motion must also be granted. The documents submitted on the motion demonstrate with perfect clarity that TTT neither acted, nor held itself out as, a common carrier by water in connection with this shipment. The only action of TTT upon which plaintiff relies is its execution of the bill of lading, pursuant to authority derived from the master. Under familiar principles, that action of TTT bound the vessel and Ahrenkel to the contract of ocean carriage,⁷ but plaintiff cites no authority that an agent, performing this limited function, becomes liable as an ocean carrier, and of course that is not the law. While the bill of lading is not before the court, I have no reason to doubt that it identifies TTT as an agent for parties other than TTT, who would perform the ocean carriage. Plaintiff does not suggest otherwise.

A 46
Memorandum and Order Appealed From

IV.

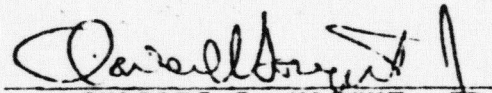
The remaining defendant Amtorg Trading Corporation, while stated by Lamorte in its January 9, 1975 letter to have some sort of connection with "various Russian fleets", has never been served by plaintiff. The complaint is dismissed as to that defendant for lack of prosecution.

Conclusion

For the foregoing reasons, the complaint is dismissed in its entirety.

It is So Ordered.

Dated: New York, New York
October 26, 1976



CHARLES S. HAIGHT, JR.
U. S. D. J.

Footnotes

1. The court's factual recitation is based on the motion papers. Analysis of the affidavits and briefs indicates that there are no material issues of fact.
2. A "disponent owner" of a vessel has her under charter from the registered owner, and consequently has the use of the vessel at his disposition.
3. "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: Provided, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered."
4. Lemorte is the New York agent and correspondent for a number of English marine insurance interests. A "P & I underwriter" ("protection and indemnity") covers, inter alia, the risk of a vessel's liability to cargo for damage or loss during an ocean voyage.
5. For comparable reasons, there is no basis for binding Ahrenkel on the equitable ground of estoppel. §8B of the Restatement provides:

"(1) A person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions, because of their belief that the transaction was entered into by or for him, if

- (a) he intentionally or carelessly caused such belief, or
- (b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify them of the facts."

Again, the question turns upon the principal's (i.e., Ahrenkel's) action in causing the third party's misapprehension of an agency relationship, or in failing to remedy that misapprehension when made aware of it. In the case at bar, Ahrenkel did nothing to make plaintiff believe TTT was his agent, and (so far as appears) did not learn of plaintiff's misapprehension until the statute of limitations had run.

6. Unlike Lamorte, TTT purported to grant an extension of time prior to the expiration of the statute of limitations. However, TTT did not expressly purport to act on behalf of Ahrenkel or the vessel; nor, in the circumstances of the case, can TTT be regarded as having implied such authority. Randall was content to file its claim with TTT; it made no inquiry of TTT's authority to bind the vessel or her owner, and received no assurance from TTT of such authority, before the statute expired. In these circumstances there is no basis for asserting a liability on the part of TTT under §329 or §330 of the Restatement.
7. Even where a charterer's agent signs the bill of lading without authority from the master or owner, the sailing of the vessel with the cargo on board constitutes a ratification of the bill of lading sufficient to render the vessel liable in rem for cargo damage, although in those circumstances her owner is not liable in personam. Demsey & Associates v. S.S. Sea Star, 461 F.2d 1009 (2d Cir. 1972); Associated Minerals & Metals Corp. v. S.S. Portoria, 484 F.2d 460 (5th Cir. 1973); United Nations Children's Fund v. S/S Nordstern, 251 F.Supp. 833 (S.D.N.Y. 1966). Where, as here, an agent is authorized to sign for the master, the shipowner is also bound in personam. The Themis, 275 Fed. 254, 262 (2d Cir. 1921); Trans-Amazonica Iquites, S.A. v. Georgia Steamship Company, 335 F.Supp. 935, 940 (S.D.Ga. 1971).

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NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

V/O EXPORTKHLEB and CONTINENTAL GRAIN EXPORT CORPORATION,	:	
	:	
Plaintiffs,	:	75 Civ. 254 (CSH)
	:	
- against -	:	
	:	
AMTORG TRADING CORPORATION and TEXAS TRANSPORT & TERMINAL CO., INC., M/V CONSTANTIA and CHRISTIAN F. AHRENKEL, .	:	<u>NOTICE OF APPEAL</u>
	:	
Defendants.	:	

-----X

S I R S :

NOTICE IS HEREBY GIVEN that plaintiff, V/O
EXPORTKHLEB, plaintiff above named, hereby appeals to the
United States Court of Appeals for the Second Circuit from
an order dismissing the plaintiff's complaint against
defendants, AMTORG TRADING CORPORATION and TEXAS TRANSPORT
& TERMINAL CO., INC., M/V CONSTANTIA and CHRISTIAN F.
AHRENKEL, entered in this action on the 28th day of October,
1976.

Dated: New York, New York
November 24, 1976

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN
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(212) 233-6171

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Notice of Appeal

TO: CICHANOWICZ & CALLAN
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New York, New York 10004

BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for Defendant-Respondent
TEXAS TRANSPORT & TERMINAL CO., INC.
99 John Street
New York, New York 10038

and thereby service of *Two* copies
of the within *APPENDIX* is hereby
admitted this *16th* day of *JANUARY* 1977

.....
Attorney for *APPELLER TEXAS TRANSPORT*

COPY RECEIVED

JAN 10 1977

Bigham, Englar, Jones & Houston

ATTORNEYS FOR APPELLER AHERNKIAL

CICHANOWICZ & CALLAN

JAN 10 1977

by Michael J. Cichanowicz

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